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IN THE

Supreme Court of the United States.

OCTOBER TERM, [redacted] 1922

No. 547/107

THE CUDAHY PACKING COMPANY OF NEBRASKA,
A CORPORATION,
Petitioner,

vs.

MARY ANN PARRAMORE, AS WIDOW AND AS GUARDIAN OF THE PERSONS AND ESTATES OF OWEN PARRAMORE, RUTH PARRAMORE AND LUELLA PARRAMORE, MINOR CHILDREN OF JOSEPH PARRAMORE, DECEASED, AND THE INDUSTRIAL COMMISSION OF UTAH,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF UTAH AND BRIEF IN SUPPORT OF PETITION.

GEORGE T. BUCKINGHAM,
THOMAS CREIGH,
R. B. WEBSTER,
STEPHEN E. HURLEY,
Attorneys for Petitioner.

BUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1921.

No. .....

THE CUDAHY PACKING COMPANY OF NEBRASKA, A CORPORATION,

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vs.

MARY ANN PARRAMORE, AS WIDOW AND AS GUARDIAN OF THE PERSONS AND ESTATES OF OWEN PARRAMORE, RUTH PARRAMORE AND LUELLA PARRAMORE, MINOR CHILDREN OF JOSEPH PARRAMORE, DECEASED, AND THE INDUSTRIAL COMMISSION OF UTAH,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF UTAH.

(Italics Ours.)

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, The Cudahy Packing Company of Nebraska, a corporation (referred to herein as "Petitioner") respectfully shows:

Petitioner owns and operates a packing plant at North Salt Lake, Utah, about six miles north of Salt Lake City

and one-half mile west of the Salt Lake-Ogden highway running north and south. A county road runs west at right angles to this highway and extends past and beyond the plant. Between the Salt-Lake-Ogden highway and the plant this county road is crossed by one electric and two railroad lines. It is used by the public generally, including persons employed by others on the further side of the packing plant.

It appears without contradiction that, on August 9, 1921,

Joseph Parramore	A stationary engineer, working by the day,
on his way to work,	before his employment had begun,
while riding in a friend's automobile,	petitioner having no interest in it and in no way furnishing it,
on a public highway,	used by many persons other than the employees of petitioner, and not on petitioner's premises,
was struck at a railroad crossing,	on the main line, and not a part of the switching facilities of the plant,
by a railroad engine,	not owned or operated by, or in the service of petitioner,
and killed,	at a point on the county road about 100 feet from the entry to petitioner's plant.

The employment of deceased was within certain hours and within the plant. Outside of the plant and outside of those hours he had no duties.

In 1917, Utah adopted a Workmen's Compensation Act, which has been subsequently amended. Section 3113

of this act, as amended, provides compensation for "Every such employee who is killed by accident *arising out of*, or *in the course of*, his employment, wheresoever such injury has occurred," etc.

Mary Ann Parramore, as the widow, and as guardian of their three children, claimed compensation under this act. Upon a hearing The Industrial Commission of Utah (herein referred to as "Commission") awarded compensation and also funeral expenses and attorney's fees to be paid by petitioner.

Thereafter, petitioner sued out a writ of review in the Supreme Court of Utah (herein referred to as "state court") seeking to set aside this award. The state court affirmed the award. Petitioner's application for a rehearing was denied on May 23, 1922.

Petitioner shows here, as in the state court, that the action of the Commission and of the state court deprives it of its property without due process of law and denies to it the equal protection of the laws, contrary to Fourteenth Amendment to the Constitution of the United States, in that

(a) The Commission was wholly without jurisdiction because the accident was not an industrial accident, and did not result from any hazard of petitioner's business, and was in no way connected with its employment of the deceased.

(b) Whether or not the Workmen's Compensation Act of Utah is constitutional and valid, the action of the state court was arbitrary, unreasonable, unjust and oppressive, and in disregard of established law.

(c) Section 3113 of said act, as construed and applied in this cause, is arbitrary, oppressive and unreasonable in that it authorizes the award of compensation for death resulting from an accident not attributable to the employment of deceased, and not in any way connected therewith.

Petitioner submits that the judgment of the state court should be brought here for review by this court upon the errors assigned on the record herein.

Petitioner shows the following grounds for the allowance of a petition for certiorari:

1. Want of jurisdiction in the Commission to make its award.

2. The unconstitutionality (irrespective of the statute) of the action of the state court, depriving petitioner, as it does, of rights, privileges and immunities guaranteed to it under the Federal Constitution.

3. The unconstitutionality of the Workmen's Compensation Act of Utah as construed and applied in this case.

4. The great public importance of the questions involved.

Petitioner submits herewith a brief and an appendix of authorities in support of this petition. The transcript of record filed in this cause in the proceedings on error in this court is made a part of this petition.

It is vital that this court should at this time determine whether or not, under the Federal Constitution, state courts or state legislatures may compel employers to provide compensation for all injuries to employees wherever, whenever and however they may occur. May an employer under the Constitution be compelled to become the general insurer of the lives and safety of his employees? Petitioner contends that he may not be so compelled. This case involves that question.

WHEREFORE, petitioner prays that this Honorable Court will grant its writ of certiorari directed to the Supreme Court of the State of Utah requiring that the record of said case in said court entitled "The Cudahy Packing Company of Nebraska, a corporation, *vs.* Mary Ann Parramore, as widow and guardian of the persons and es-

tates of Owen Parramore, Ruth Parramore and Luella Parramore, minor children of Joseph Parramore, deceased, No. 3778," and its judgment and orders therein, may be certified to this court, and that this Honorable Court will thereupon proceed to correct the errors complained of, reverse the said judgment, and give to petitioner such other and further relief as the nature of the case may require and to the court may seem proper in the premises.

GEORGE T. BUCKINGHAM,
THOMAS CREIGH,
R. B. WEBSTER,
STEPHEN E. HURLEY,
Attorneys for Petitioner.

STATE OF ILLINOIS }
COUNTY OF COOK } ss.

L. H. Goss, being duly sworn, on oath says that he is the Assistant Treasurer of The Cudahy Packing Company of Nebraska, a corporation, the petitioner named in the foregoing petition, and its duly authorized agent in this behalf, that he has read the foregoing petition, that he has knowledge of the facts recited therein, and that the same are true, as he verily believes. This application is made in good faith and not for the purpose of delay.

L. H. Goss.

Subscribed and sworn to before me this 11th day of August, A. D. 1922.

WILLIAM J. QUIN,
(NOTARIAL SEAL) *Notary Public.*

My commission expires July 10, 1924.

CERTIFICATE.

I hereby certify that I have examined the foregoing petition and that in my opinion it is well founded in law and entitled to the favorable consideration of this court.

GEORGE T. BUCKINGHAM.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1921.

No. .....

THE CUDAHY PACKING COMPANY OF NEBRASKA, A CORPORATION,
Petitioner,

vs.

MARY ANN PARRAMORE, ETC.,
Respondents.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

This case presents a fundamental question: Under the Federal Constitution may a state court or a state legislature compel an employer to become the general insurer of the lives and safety of his employees?

Petitioner here contends that the decision of the state court, in affirming the award of the Commission, deprives petitioner of its property without due process of law, and denies to it the equal protection of the laws, because

I. The Commission was without jurisdiction;

II. Without reference to any statute, the action of the state court was arbitrary, unreasonable and unwarranted, and in disregard of established law.

III. The Utah Workmen's Compensation Act, as construed and applied in this case, is unconstitutional.

The death of the deceased did not result from any injury *arising out of* or received *in the course of* his employment.

The definition of the phrases "in the course of" and "arising out of," most widely accepted and followed, is that in McNicol's case, 215 Mass. 497, 102 N. E. 397, L. R. A. 1916-A, 306, 307:

> "An injury is received 'in the course of' the employment when it comes while the workman is doing the duty which he is employed to perform. It 'arises out of' the employment when there is * * * a causal connection between the conditions under which the work is required to be performed and the resulting injury. * * * The causative danger must be peculiar to the work and not common to the neighborhood."

Broadly, the phrase "in the course of" refers to time, place and circumstance, and the phrase "arising out of" refers to cause and effect. Deceased met his death at a time when he was not employed and at a place other than that of his employment. There was absolutely no causal connection between his employment and the accident which ended his life. The accident was not an industrial accident but one which might have occurred to any member of the public on the public highway. Therefore, the court was without jurisdiction.

> *Bamberger Electric R. R.* v. *Ind. Com. of Utah*, 203 Pac. (Utah) 345, 346, and cases cited under Point I, Appendix.

It is one thing to make an employer liable for his *industrial* accidents; it is quite another thing to make him liable for *all other* accidents. Can an employer be

made liable, either by a state court or by a state legislature, for all injuries to his employees wherever, whenever and however they may occur? Such is the effect of the decision here complained of. It goes far beyond the legitimate scope of workmen's compensation acts and is a plain, palpable abuse of judicial and legislative authority.

The action of the state court contravenes the Federal Constitution and all accepted principles as to the application of workmen's compensation laws. There is a recent commentary (1921) on these laws in Volume 28 of Ruling Case Law, in which it is said that (pp. 804-805):

> "The compensation act, it has been very generally held, does not authorize an award in case of injury or death from a peril which is common to all mankind, or to which the public at large is exposed. The argument seems to be that if the workman were permitted to recover in such cases, he would enjoy privileges above those of the public generally, and in effect be insured against every sort of calamity, which is not the intention of the statute. At home or on the street he may meet with accident not arising out of or in the course of his employment. The act does not cover such cases. The employee gets up in the morning, dresses himself, and goes to work, because of his employment; yet if he meets with an accident before coming to the employer's premises or his place of work, that is not a risk of his occupation, but of life generally."

The state court points out that petitioner's liability, if any, must rest upon the fact that "at the date of the employment the danger incident to crossing the railroad tracks must have been in the contemplation of the parties." With as much propriety it might be said that it was contemplated that deceased would pass through his own door, along the sidewalk in front of his home, across the trolley line in the neighborhood and over the very numerous tracks along and across the Salt Lake-

Ogden Highway. It cannot be the law that petitioner would have been liable for an injury to an employee who had slipped on his own doorstep or on the sidewalk in front of his home, or who had been struck by an automobile or a trolley car in his own neighborhood. Such accidents are not a part of the hazard of the industry. Is petitioner responsible for all injuries resulting to any of its hundreds of employees who must inevitably each day cross numerous tracks within and without Salt Lake City? Where does the liability of the petitioner commence? Does it attach when the employee leaves his home, when he crosses the first track six miles from the plant, or when he reaches a point five, three or two miles from the plant? The premise relied on by the state court only emphasizes the arbitrary character of its decision.

There is no evidence to support a finding that the deceased met his death in an accident arising out of or in the course of his employment. Such a finding is unwarranted and wholly unauthorized.

The legal effect of evidence is a question of law, and a finding without evidence (as in this case) is beyond the jurisdiction of the Commission. It "comes under the Constitution's condemnation of all arbitrary exercise of power."

Int. Comm. Comm. v. *Louisville & Nashville R. R. Co.* 227 U. S. 88, 91, 92.

Since the Commission was without jurisdiction there can be no due process.

The provisions of the Federal Constitution protecting the rights and property of persons extend "to all acts of the state, whether through its legislative, its executive or its judicial authorities." The restraints of the Four-

teenth Amendment bind equally judges and legislatures. Neither can act in disregard of fundamental laws.

Scott v. *McNeal*, 154 U. S. 34, 45.

C. B. & Q. R. R. Co. v. *Chicago*, 166 U. S. 226, 233, 235, and cases cited under Point IV, Appendix.

A judgment of a state court which deprives a person of property without due process amounts to a denial of a right secured by the Fourteenth Amendment, "even if it be authorized by statute." (*C. B. & Q. R. R.* v. *Chicago, supra.* See also *Scott* v. *McNeal, supra.*)

The state court has arbitrarily and capriciously attempted to construe and apply the Workmen's Compensation Act of Utah to a state of facts to which it can have no application.

Various workmen's compensation acts have been upheld by this court, but, in every case they have been so upheld on the theory that it is proper public policy to charge to an industry (rather than to the individual employees) the cost of those injuries *attributable to the inherent hazards of that industry.*

Arizona Employers Liability Acts, 250 U. S. 400, 420, 422, and cases cited under Point VII.

We do not here assail that principle. Our basic objection to the decision of the state court is that it imposes upon petitioner a liability for death from an accident not in any way attributable to the hazards of its business or industry, and wholly unconnected therewith.

Section 3113 in terms permits a recovery for death either "arising out of" *or* "in the course of" employment. The Utah act is, therefore, broader than any similar statute considered by this court. As construed and

applied, it permits a recovery for death from accidents foreign to employment. The result is an infringement of private property rights not justifiable on any ground of public policy.

The arbitrary and baseless character of both the decision and the statute recommends petitioner to the protection of this court.

GEORGE T. BUCKINGHAM,
THOMAS CREIGH,
R. B. WEBSTER,
STEPHEN E. HURLEY,
Attorneys for Petitioner.

APPENDIX.

Authorities Relied On by Petitioner in Support of Its Petition for Certiorari.

I.

The accident did not *arise out of* the employment of deceased, *or in the course* of his employment.

There was no employment of deceased by petitioner at the time of the accident. Death did not result from an industrial accident.

In re McNicols, 215 Mass. 497; 102 N. E. 697, L. R. A. 1916-A, 306.

Ruling Case Law (1921), Vol. 28, pp. 804, 805.

Bamberger Electric Railway Co. v. *Ind. Comm. of Utah* (Utah, 1921), 203 Pac. 345, 346.

Kowalek et al. v. *N. Y. Consol. R. Co.* (1920), 229 N. Y. 489; 128 N. E. 888, 889.

Re DeVoe, 218 N. Y. 318; 113 N. E. 256, 257, L. R. A. 1917-A, 250.

Tallon v. *Interborough Rapid Transit Co.* (N. Y. 1922), 134 N. E. 327.

Clapp's Parking Station v. *Ind. Acc. Comm. of Calif.* (1921), 197 Pac. 369, 370.

Orsinie v. *Torrance et al.* (Conn. 1921), 113 Atl. 924, 925.

Schultz et al. v. *Champion Welding & Mfg. Co. et al.* (1920), 184 N. Y. Sup. 719, 720.

II.

Whether there is any evidence to support the findings of the Commission is a question of law. A finding without evidence (as in this case) is beyond the jurisdiction of the Commission. It comes "under the Constitution's condemnation of all arbitrary exercise of power."

Int. Comm. Comm. v. *Louisville & Nashville R. R. Co.* 227 U. S. 88, 91, 92.

Bamberger Electric R. Co. v. *Ind. Comm. of Utah* (Utah, 1921), 203 Pac. 345, 346.

Clapp's Parking Station v. *Ind. Acc. Comm. of Calif.* (1921), 197 Pac. 369, 370.

III.

Since the Commission was without jurisdiction, its award deprived petitioner of its property without due process of law.

Scott v. *McNeal,* 154 U. S. 34, 46.

Int. Comm. Comm. v. *Louisville & Nashville R. R. Co.* 227 U. S. 88, 92.

IV.

The provisions of the Federal Constitution protecting the rights and property of persons extend "to all acts of the state, whether through its legislative, its executive or its judicial authorities." The restraints of the Fourteenth Amendment bind equally judges and legislatures. Neither can act in disregard of fundamental laws.

Scott v. *McNeal,* 154 U. S. 34, 45.

C. B. & Q. R. R. Co. v. *Chicago,* 166 U. S. 226, 233, 235.

Twining v. *New Jersey,* 211 U. S. 78, 90, 91.

Ex Parte Virginia, 100 U. S. 339, 346, 347.

Schofield, Constitutional Law and Equity (1921), pp. 5, 9, 21.

The Supreme Court of the United States and the Enforcement of State Law by State Courts, by Henry Schofield, 3 Ill. Law Review, 195.

V.

A judgment of a state court which deprives a person of property without due process amounts to a denial of a right secured by the Fourteenth Amendment "even if it be authorized by statute."

C. B. & Q. R. R. Co. v. *Chicago,* 166 U. S. 226, 241.

Scott v. *McNeal,* 154 U. S. 34, 45.

Schofield, Constitutional Law and Equity (1921), pp. 5-37.

VI.

Whether or not the statute is constitutional and valid, the action of the state court is so arbitrary, oppressive and unreasonable, and so contrary to law that it violates the Fourteenth Amendment to the Constitution of the United States.

Int. Comm. Comm. v. *Louisville & Nashville R. R. Co.,* 227 U. S. 88, 92.

Scott v. *McNeal,* 154 U. S. 34, 45, 46.

C. B. & Q. R .R. Co. v. *Chicago,* 166 U. S. 226.

Twining v. *New Jersey,* 211 U. S. 78.

Ex parte Commonwealth of Va., 100 U. S. 339, 346, 347.

Schofield, Constitutional Law and Equity (1921), pp. 5-37.

The Supreme Court of the United States and the Enforcement of State Law by State Courts, Henry Schofield, 3 Ill. Law Rev. 195.

In the matter of Kemmler, 136 U. S. 436, 448, 449.

VII.

Under the decisions of this court sustaining workmen's compensation acts, the basic idea is that death or injury must be a part of the hazard of the industry. The Utah act extends far beyond the legitimate scope of such acts.

Arizona Employers Liability Cases, 250 U. S. 400, 420, 422, and cases cited under Point VI.

Middleton v. *Texas Power & Light Co.,* 249 U. S. 152.

Mountain Timber Co. v. *Washington,* 243 U. S. 219, 239, 243.

Hawkins v. *Bleakley,* 243 U. S. 210.

New York Central R. R. Co. v. *White,* 243 U. S. 188, 202, 203.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1923.

No. 107

THE CUDAHY PACKING COMPANY OF NEBRASKA, A CORPORATION,

Plaintiff in Error,

vs.

MARY ANN PARRAMORE, AS WIDOW AND AS GUARDIAN OF THE PERSONS AND ESTATES OF OWEN PARRAMORE, RUTH PARRAMORE AND LUELLA PARRAMORE, MINOR CHILDREN OF JOSEPH PARRAMORE, DECEASED, AND THE INDUSTRIAL COMMISSION OF UTAH,

Defendants in Error.

BRIEF OF PLAINTIFF IN ERROR.

GEORGE T. BUCKINGHAM,
THOMAS CREIGH,
R. B. WEBSTER,
STEPHEN E. HURLEY,
Attorneys for Plaintiff in Error.

GUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1923.

No. 107.

THE CUDAHY PACKING COMPANY OF NEBRASKA, A CORPORATION,
Plaintiff in Error,

vs.

MARY ANN PARRAMORE, AS WIDOW AND AS GUARDIAN OF THE PERSONS AND ESTATES OF OWEN PARRAMORE, RUTH PARRAMORE AND LUELLA PARRAMORE, MINOR CHILDREN OF JOSEPH PARRAMORE, DECEASED, AND THE INDUSTRIAL COMMISSION OF UTAH,
Defendants in Error.

ERROR TO SUPREME COURT OF STATE OF UTAH.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF CASE.

This writ of error brings to the attention of this court for review a final judgment of the Supreme Court of Utah (a court of last resort referred to herein as "Utah Court"), affirming an award by the Industrial Commission of Utah (sometimes referred to as "Commis-

sion"), that plaintiff in error pay compensation in the amount of approximately $5,000 to defendants in error.†

Plaintiff in error contends that

(a) the judgment of the Utah Court and the award of the Commission (irrespective of any statute) and

(b) the Utah Workmen's Compensation Act, as construed and applied in this case,

deprive it of rights guaranteed by the Fourteenth Amendment to the Federal Constitution and are, therefore, unconstitutional and void. These contentions were properly presented to the Utah Court* and are more fully indicated in the argument. (Brief, pp. 6-13.)

Fundamentally it is the position of plaintiff in error that

(1) the injury complained of did not arise out of an industrial accident, and

(2) that a Workmen's Compensation Law or an award of a Commission purporting to act under it, is unconstitutional and void when attempting to deal with a non-industrial accident.

Plaintiff in error, The Cudahy Packing Company of Nebraska (sometimes referred to herein as "Cudahy Company") owns and operates a packing plant at North Salt Lake, Utah, about six miles north of Salt Lake City and one-half mile west of the Salt Lake-Ogden highway running north and south. The Davis County road, a public highway, runs west at right angles to this highway and extends past and beyond the plant. Between the Salt Lake-Ogden highway and the plant this county road is crossed by one electric and two railroad lines. It is used by the public generally, including persons employed by others on the further side of the packing plant.

†The phrase "defendants in error" is used to refer only to individual defendants in error.

*See brief of plaintiff in error in opposition to motion to dismiss.

An examination of the record will show that the uncontradicted facts are, that on August 9, 1921,

Joseph Parramore,	a stationary engineer, working during the day (Rec., 18, 30, 38),*
on his way to work,	before his employment had begun (Rec., 26, 32, 42, 43),
while riding in a friend's automobile,	Cudahy Company having no interest in it and in no way furnishing it (Rec., 24, 31, 35, 54, 55, 70, 72),
on a public highway,	used by many persons other than the employees of Cudahy Company, and not on its premises (Rec., 26, 27, 39-43),
was struck at a railroad crossing,	on the main line, and not a part of the switching facilities of the plant (Rec., 23, 24, 54, 70, 72),
by a railroad engine,	not owned or operated by, or in the service of Cudahy Company (Rec., 24, 43, 44, 54),
and killed,	at a point on the county road about 100 feet from the entrance to Cudahy Company's plant. (Rec., 36, 37.)

The deceased resided in Salt Lake City. (Rec., 19.) He usually went to the Cudahy plant by way of the Bamberger Electric Railroad. On the morning in question he used what was for him an unusual conveyance. (Rec., 18.) His employment was within certain hours and within the plant. Outside of the plant and outside of those hours he had no duties.

Plaintiff in error did not furnish any means of transportation to its employees.

*The designation "Rec." refers to pages of the printed record.

The record indicates with certainty that:

Deceased came to his death in an accident.

(a) Not in the course of his employment,
(b) Not arising out of his employment,
(c) Not due to any action or neglect of plaintiff in error.
(d) Not attributable to any hazard of the business of plaintiff in error, but to a hazard to which the public generally was exposed.

The accident occurred at a time

(a) When deceased was not on the premises of plaintiff in error,
(b) Outside the hours of employment of deceased,
(c) When deceased was not engaged in any business of plaintiff in error.

The accident occurred on a public highway and resulted from a collision between an automobile and a railroad engine.

The automobile was

(a) Not owned, controlled or furnished by plaintiff in error.
(b) Not the means of transportation ordinarily employed by deceased,
(c) Not engaged in any business of plaintiff in error.

The railroad engine was

(a) Not owned or controlled by plaintiff in error,
(b) Being operated on the railroad right-of-way at an intersection with the public highway,
(c) Not engaged in any business of plaintiff in error.

There is no conflict of evidence as to any material fact.

Section 3113 of the Utah Workmen's Compensation Act, as amended, provides compensation for

"* * * every such employee who is killed by acci-

dent arising out of, or in the course of this employment, wheresoever such injury has occurred * * *," etc.*

Upon the foregoing state of facts Mary Ann Parramore, as the widow of Joseph Parramore, and as guardian of their three children, was awarded compensation by The Industrial Commission of Utah. The Supreme Court of Utah affirmed the award. (207 Pac. 148, Rec., 70.)

Errors Relied On.

We contend (as more fully appears from the assignments of error, Rec., 88-90), that the judgment of the State Court in affirming the award of the Commission deprives plaintiff in error of its property without due process of law, and denies to it the equal protection of the laws, and is, therefore, contrary to Section I of the Fourteenth Amendment to the Constitution of the United States, in that

1. The Commission was wholly without jurisdiction to make the award because the accident was not an industrial accident, and was entirely outside the Utah statute, since it did not result from any hazard of petitioner's business and was in no way connected therewith.
2. Whether or not the Utah statute (or said Sec. 3113 thereof) is constitutional and valid, the action of the State Court was arbitrary, unreasonable, unjust and oppressive, unsupported by evidence and in disregard of established law since it acted contrary to the undisputed evidence and upon an assumption unsupported in facts.
3. Section 3113 of the Utah statute as construed and applied in this cause is arbitrary, oppressive and unreasonable in that it authorizes the award of compensation for death resulting from an accident not attributable to the employment of deceased and not in any way connected therewith.

*Sec. 3113, Chap. 100, Laws of Utah, 1917 as amended by Chap. 63, Laws of Utah, 1919, and further amended by Chap. 67, Laws of Utah, 1921. This section is set forth in full in the appendix.

BRIEF OF ARGUMENT.*

Plaintiff in error challenges the arbitrary action of

I. The Utah Court and Commission, and

II. The Utah Legislature.

In the event that this court sustains our contention that the action of the Utah Court and Commission is void for the constitutional reasons which we urge, then, of course, the constitutionality of the Utah Compensation Act is not material. But to the extent that it is assumed in this court that the Supreme Court of Utah has properly construed the statute, it is also our contention that Section 3113 of the Utah statute as so construed and applied is unconstitutional and void to the extent that it is held to include compensation arising out of claims such as presented by the facts of this case. It will be seen that our contentions are not inconsistent. With the foregoing in mind, we contend that the Commission acted without jurisdiction and in disregard of law, and the court which affirmed its award did so arbitrarily and without warrant.

Section 3113 of the Utah statute to the extent it is construed and applied to the facts in this case is unconstitutional and void.

This case presents at least two fundamental constitutional questions:

(a) Is the award of a Commission (or a court) valid when it acts outside of its own jurisdiction, contrary to the undisputed evidence before it, and in arbitrary disregard of established law.

(b) Under the Federal Constitution and the de-

*Authorities in support of contentions of plaintiff in error are cited in the Appendix to this brief.

cisions of this court, is a compensation act of a state valid insofar as it requires an employer to pay compensation for accidents outside of its industrial risk.

I.

THE ARBITRARY ACTION OF THE COURT IN AFFIRMING THE AWARD OF THE COMMISSION.

The provisions of the Federal Constitution protecting the rights and property of persons, extend "to all acts of the state, whether through its legislative, its executive or its judicial authorities." The restraints of the Fourteenth Amendment bind equally judges and legislatures. Neither can act in disregard of fundamental law. (See Authorities, Point VIII, Appendix.)

A judgment of a state court which deprives a person of property without due process amounts to a denial of a right secured by the Fourteenth Amendment "even if it be authorized by statute." (See Authorities, Point IX, Appendix.) This is true whether or not the statute is valid.

The test to be applied to the judgment of the court is not what the court says, but what the court does. Even if a court lays down correct principles it may not then, upon undisputed facts, arbitrarily disregard them.

Under the Utah statute, the Industrial Commission does not have a general jurisdiction. It may award compensation for industrial accidents arising out of the relation of employer and employe, but that is the limit of its jurisdiction. (Sec. 3113, Utah Statute, this brief, pp. 4-5.)* The Commission has no jurisdiction over ordinary tort claims. In the instant case the Commission

*Secs. 3110-3113, 3130, Chap. 100, Laws of Utah, 1917, as amended by Chap. 63, Laws of Utah, 1919, and further amended by Chap. 67, Laws of Utah, 1921. These sections are set forth in the appendix.

had no more jurisdiction over the claim of defendants in error than it would have had if deceased had been struck down by a motor truck on the streets of Salt Lake City. Proximity alone could not give it jurisdiction or fasten liability on plaintiff in error.

The action of the Utah court in affirming the award of the Commission was arbitrary and baseless, because the death of the deceased did not result from any injury *arising out of*, or received *in the course of, his employment.*

The definition of the phrases "in the course of" and "arising out of," most widely accepted and followed, is that in McNicol's case, 215 Mass. 497, 102 N. E. 697. L. R. A. 1916-A, 306, 307:

> "* * * An injury is received 'in the course of' the employment when it comes while the workman is doing the duty which he is employed to perform. It arises 'out of' the employment when there is * * * a causal connection between the conditions under which the work is required to be performed and the resulting injury * * * The causative danger must be peculiar to the work and not common to the neighborhood. * * *"

Broadly, the phrase "in the course of" refers to time, place and circumstance, and the phrase "arising out of" refers to cause and effect. Deceased met his death at a time when he was not employed and at a place other than that of his employment. There was absolutely no causal connection between his employment and the accident which ended his life. The accident was not an industrial accident but one which might have occurred to any member of the public on the public highway. Therefore, the court, as well as the Commission, was without jurisdiction.

> *Bamberger Electric R. Co.* v. *Ind. Com. of Utah,* 203 Pac. (Utah) 345, 346, and cases cited under Points I and V, Appendix.

It is one thing to make an employer liable for his industrial accidents; it is quite another thing to make him liable for all other accidents. Can an employer be made liable, either by a state court or by a state legislature, for all injuries to his employes wherever, whenever and however they may occur? Such is the effect of the decision here complained of. It goes far beyond the legitimate scope of workmen's compensation acts and evidences a plain, palpable abuse of judicial and legislative authority.

The action of the state court contravenes the Federal Constitution and all accepted principles as to the application of workmen's compensation laws. There is a recent commentary (1921) on these laws in Volume 28 of Ruling Case Law, in which it is said that (pp. 804-805):

> "The compensation act, it has been very generally held, does not authorize an award in case of injury or death from a peril which is common to all mankind, or to which the public at large is exposed. The argument seems to be that if the workman were permitted to recover in such cases, he would enjoy privileges above those of the public generally, and in effect be insured against every sort of calamity, which is not the intention of the statute. At home or on the street he may meet with accident not arising out of or in the course of his employment. The act does not cover such cases. The employee gets up in the morning, dresses himself, and goes to work, because of his employment; yet if he meets with an accident before coming to the employer's premises or his place of work, that is not a risk of his occupation, but of life generally."

The Commission based its award upon the theory that Cudahy Company was dependent upon the shipping facilities furnished by the railroad. (Rec., 55, 72.) The Utah court disregarded this theory and pointed out that the liability of plaintiff in error, if any, must rest upon

the fact that "at the date of the employment the danger incident to crossing this railroad track * * * must be held to have been within the contemplation of the parties * * *." (Rec., 72.) There was no evidence to support the conclusions of the Commission or the Utah court. With as much propriety it might be said that it was contemplated that dedeceased would pass through his own door, along the sidewalk in front of his home, across the trolley line in the neighborhood and over the very numerous tracks along and across the Salt Lake-Ogden Highway. It cannot be the law that plaintiff in error would have been liable for an injury to an employee who had slipped on his own doorstep or on the sidewalk in front of his home, or who had been struck down by an automobile or a trolley car in his own neighborhood. Such accidents are not a part of the hazard of the industry and from a constitutional standpoint the hazard of the industry is the limit to which the employer may be required to pay compensation. The premise relied on by the state court only emphasizes the arbitrary character of its decision.

In *Myles Salt Company* v. *Iberia Drainage District,* 239 U. S. 478, the Supreme Court of Louisiana sustained the action of a police jury, which pursuant to statute, had included in a drainage district property not benefited, and levied a special drainage tax on such property. On writ of error in this court an owner of property not benefited contended that the action of the police jury deprived it of property without due process. No question was raised as to the validity of any statute. The Court said:

"There is no dispute about the state laws (p. 479) * * *. The ground of the attack is that the dis-

> trict for * * * which the tax was levied was of no benefit to plaintiff's land and was formed only for the benefit of the other lands, was an unconstitutional usurpation of authority, and was and is an effort to take plaintiff's property without due process of law * * * (p. 480) * * * There is no doubt that a Federal right was asserted (p. 483). * * * And such decision, it is further contended was a decision upon the State Law and presents no Federal question, the statute of the state not being attacked. We cannot concur in the contention, it is true the law of the state as written is not attacked but the law as administered and justified by the Supreme Court of the State is attacked and it is asserted to be a violation of the Constitution of the United States. The question presented is Federal and the motion to dismiss is denied." (p. 484.)

In the decision on the merits in the *Myles* case this court recognized the right of the state to constitute drainage districts but held that the power to do so had been "arbitrarily exerted" and, for that reason, reversed the judgment of the Supreme Court of Louisiana.

There is no evidence to support a finding that the deceased met his death in an accident arising out of or in the course of his employment. Such a finding is unwarranted and wholly unauthorized.

The legal effect of evidence is a question of law, and a finding without evidence (as in this case) is beyond the jurisdiction of the Commission. It "comes under the Constitution's condemnation of all arbitrary exercise of power."

> *Int. Comm. Comm.* v. *Louisville & Nashville R. R. Co.* 227 U. S. 88, 91, 92.

The state court, in affirming the award of the Commission, has arbitrarily and capriciously attempted to construe and apply the Workmen's Compensation Act of

Utah to a state of facts to which it can have no application.

Since the Commission (and the court as well) was without jurisdiction there can be no due process.

II.

UNCONSTITUTIONALITY OF UTAH STATUTE AS CONSTRUED AND APPLIED.

The decision of the Utah court involved the construction and the application of the Utah statute and particularly Section 3113 thereof (set forth in this brief, pp. 4, 5). Whether or not a statute is unconstitutional depends upon its construction and application in a particular case. A statute may be valid as applied to one set of facts and invalid as applied to another.

> *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282, and see cases cited under Point II, Appendix.

The Utah statute as construed and applied in this case operated to deprive the plaintiff in error of its property without due process of law, because pursuant to that statute, it was ordered to pay compensation for an injury not in any way incident to its business and for which it could not and should not have any responsibility or liability.

The constitutionality of workmen's compensation acts has been uniformly upheld by this court. But, in every case these acts have been so upheld on the theory that it is proper public policy to charge to an industry (rather than to the individual employees) the cost of those in-

juries *attributable to the inherent hazards of that industry.*

> *Arizona Employers Liability Acts,* 250 U. S. 400, 420-422, and cases cited under Point XI, Appendix.

The judgment here assailed lies outside that principle and we are before this court for that reason. Our basic objection to the decision of the state court is that it imposes upon plaintiff in error a liability for death from an accident not in any way attributable to the hazards of its business or industry, and wholly unconnected therewith.

The principle upon which the decisions of this court have been based is indicated in the following language from the opinion in *New York C. R. Co.* v. *White,* 243 U. S. 188, 37 Sup. Ct. Rep. 247. This court said (243 U. S. 202, 203):

> "Of course, we cannot ignore the question whether the new arrangement is arbitrary and unreasonable, from the standpoint of natural justice. Respecting this, it is important to be observed that the act applies only to disabling or fatal personal injuries received in the course of hazardous employment in gainful occupation."

Section 3113 in terms permits a recovery for death either "arising out of" *or* "in the course of" employment. The Utah act is, therefore, broader than any similar statute considered by this court. As construed and applied, it permits a recovery for death from accidents foreign to employment. The result is an infringement of private property rights not justifiable on any ground of public policy.

Here, as in the *Myles'* case, there is presented to this court an instance of power "arbitrarily exerted."

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APPENDIX.

POINTS AND AUTHORITIES.

I.

The accident did not arise out of the employment of deceased, or in the course of his employment.

There was no employment of deceased by plaintiff in error at the time of the accident. Death did not result from an industrial accident.

In re McNicol, 215 Mass. 497; 102 N. E. 697, L. R. A. 1916-A, 306.

Ruling Case Law (1921), Vol. 28, pp. 804, 805.

Bamberger Electric Railway Co. v. *Ind. Comm. of Utah* (Utah, 1921), 203 Pac. 345, 346.

Kowalck et al. v. *N. Y. Consol. R. Co.* (1920), 229 N. Y. 489; 128 N. E. 888, 889.

Re De Voe, 218 N. Y. 318; 113 N. E. 256, 257, L. R. A. 1917-A, 250.

Tallon v. *Interborough Rapid Transit Co.* (N. Y. 1922), 134 N. E. 327.

Clapp's Parking Station v. *Ind. Acc. Comm. of Calif.* (1921), 197 Pac. 369, 370.

Orsinie v. *Torrance et al.* (Conn. 1921), 113 Atl. 924, 925.

II.

A statute may be valid as applied to one set of facts and invalid as applied to another. The question to be

determined is whether or not the statute as construed and applied is valid.

Dahnke-Walker Milling Co. v. *Bondurant,* 257 U. S. 282, 42 Sup. Ct. Rep. 106, 108; 66 L. Ed. 114, 116.

Merchants National Bank v. *Richmond,* 256 U. S. 635, 641; 41 Sup. Ct. Rep. 619; 65 L. Ed. 1135.

III.

The contention that there is no evidence to support the action of the State Court raises a purely legal question.

Truax v. *Corrigan,* 257 U. S. 312; 66 L. Ed. 132, 134, 135, 42 Sup. Ct. Rep. 147.

Merchants Natl. Bank v. *Richmond,* 256 U. S. 635, 641, 41 Sup. Ct. Rep. 619, 65 L. Ed. 1135.

Jones National Bank v. *Yates,* 240 U. S. 541, 522, 553, 36 Sup. Ct. Rep, 429; 60 L. Ed. 788.

IV.

A finding upon undisputed facts is a finding of law, even though it may be styled a finding of fact. This rule is of familiar application in compensation cases.

Bates & Rogers Cons. Co. v. *Allen,* 183 Ky. 815; 210 S. W. 467, 471.

Hochspeier v. *Ind. Bd.* 278 Ill. 523; 116 N. E. 121; L. R. A. (1918 F.) 227.

Glatzl v. *Stumpp* (N. Y.), 114 N. E. 1053, 1054.

In re Fisher, 220 Mass. 581; 108 N. E. 361.

V.

Whether there is any evidence to support the findings of the Commission is a question of law. A finding without evidence (as in this case) is beyond the jurisdiction

of the Commission. It comes "under the Constitution's condemnation of all arbitrary exercise of power."

Int. Comm. Comm. v. *Louisville & Nashville R. R. Co.* 227 U. S. 88, 91, 92; 33 Sup. Ct. Rep. 185; 57 L. Ed. 431.

Bamberger Electric R. Co. v. *Ind. Comm. of Utah* (Utah, 1921), 203 Pac. 345, 346.

Clapp's Parking Station v. *Ind. Acc. Comm. of Calif.* (1921), 197 Pac. 369, 370.

VI.

In determining the legal effect of facts in evidence as a deprivation of plaintiff in error's rights under the Fourteenth Amendment, this court is

> "at as full liberty to consider them as was the State Supreme Court. * * * This court must analyze the facts as averred and draw its own inferences as to their ultimate effect and is not bound by the conclusions of the State Supreme Court in this regard."

Truax v *Corrigan*, 257 U. S. 312; 66 L. Ed. 132, 134, 135; 42 Sup. Ct. 127.

VII.

Since the Commission was without jurisdiction, its award deprived plaintiff in error of its property without due process of law.

Scott v. *McNeal*, 154 U. S. 34, 46; 14 Sup. Ct. Rep. 1108; 38 L. Ed. 896.

Int. Comm. Comm. v. *Louisville & Nashville R. R. Co.* 227 U. S. 88, 92; 33 Sup. Ct. Rep. 185; 57 L. Ed. 431.

VIII.

The provisions of the Federal Constitution protecting the rights and property of persons extend "to all acts of the state, whether through its legislative ts executive or its judicial authorities." The restraints of the Fourteenth Amendment bind equally judges and legislatures. Neither can act in disregard of fundamental laws.

Myles Salt Company v. *Iberia Drainage District*, 239 U. S. 478; 36 Sup. Ct. Rep. 204; 60 L. Ed. 392.

Scott v. *McNeal*, 154 U. S. 34, 45; 14 Sup. Ct. Rep. 1108; 38 L. Ed. 896.

C. B. & Q. R. R. Co. v. *Chicago*, 166 U. S. 226, 233, 235; 17 Sup. Ct. Rep. 581; 41 L. Ed. 979.

Twining v. *New Jersey*, 211 U. S. 78, 90, 91; 29 Sup. Ct. Rep. 14; 53 L. Ed. 97.

Ex parte Virginia, 100 U. S. 339, 346, 347; 25 L. Ed. 676.

Schofield, Constitutional Law and Equity (1921), pp. 5, 9, 21.

IX.

A judgment of a state court which deprives a person of property without due process amounts to a denial of a right secured by the Fourteenth Amendment "even if it be authorized by statute."

Myles Salt Company v. *Iberia Drainage District*, 239 U. S. 478; 36 Sup. Ct. Rep. 204; 60 L. Ed. 392.

C. B. & Q. R. R. Co. v. *Chicago*, 166 U. S. 226, 241; 17 Sup. Ct. Rep. 581; 41 L. Ed. 979.

Scott v. *McNeal*, 154 U. S. 34, 45; 14 Sup. Ct. Rep. 1108; 38 L. Ed. 896.

Schofield, Constitutional Law and Equity (1921), pp. 5-37.

X.

Irrespective of the validity of the statute, the action of the Utah court was arbitrary, oppressive and unreasonable, and contrary to law, and therefore it violates the Fourteenth Amendment to the Constitution of the United States.

Myles Salt Company v. *Iberia Drainage District,* 239 U. S. 478; 36 Sup. Ct. Rep. 204; 60 L. Ed. 392.

C. B. & Q. R. R. Co. v. *Chicago,* 166 U. S. 226, 241; 17 Sup. Ct. Rep. 581; 41 L. Ed. 979.

Scott v. *McNeal,* 154 U. S. 34, 45; 14 Sup. Ct. Rep. 1108; 38 L. Ed. 896.

Prudential Insurance Company of America v. *Check* (1922), 259 U. S. 530; 42 Sup. Ct. Rep. 516, 523, 524; 66 L. Ed. 626, 634, 635.

Schofield, Constitutional Law & Equity (1921), 5-37.

Twining v. *New Jersey,* 211 U. S. 78; 29 Sup. Ct. Rep. 14; 53 L. Ed. 97.

Exparte Virginia, 100 U. S. 339, 346, 347; 100 U. S. 339; 25 L. Ed. 676.

XI.

This court has uniformly upheld the constitutionality of Workmen's Compensation Acts, but solely on the principle that death or injury must be a part of the hazard of the industry. The Utah act as construed and applied extends far beyond this principle.

Arizona Employers Liability Cases, 250 U. S. 400, 420, 422; 39 Sup. Ct. Rep. 553; 63 L. Ed. 1058.

Middleton v. *Texas Power & Light* Co. 249 U. S. 152; 39 Sup. Ct. Rep. 227; 63 L. Ed. 527.

Mountain Timber Co. v. *Washington*, 243 U. S. 219, 239, 243; 37 Sup. Ct. Rep. 260; 61 L. Ed. 685.

Hawkins v. *Bleakley*, 243 U. S. 210; 37 Sup. Ct. Rep. 255; 61 L. Ed. 678.

New York Central R. R. Co. v. *White*, 243 U. S. 188, 202, 203; 37 Sup. Ct. Rep. 247; 61 L. Ed. 667.

SECTIONS OF UTAH WORKMEN'S COMPENSATION LAW OF STATE OF UTAH, REFERRED TO IN BRIEF OF PLAINTIFF IN ERROR.

Chap. 100, *Laws of Utah,* 1917, *as Amended by Chap.* 67, 63 *Laws of Utah,* 1919, *and Further Amended by Chap.* 67, *Laws of Utah,* 1921.

SECTION 3110. (As amended by Ch. 63, Laws of 1919.) The following shall constitute employers subject to the provisions of this title:

(1) The state and each county, city, town and school district therein.

(2) Every person, firm and private corporation, including every public utility, that has in service three or more workmen or operatives regularly employed in the same business, or in or about the same establishment, under any contract of hire, express or implied, oral or written, except agricultural laborers and domestic servants; provided, that employers who have in service less than three employes and employers of agricultural laborers and domestic servants shall have the right to come under the terms of his title by complying with the provisions thereof, and all the rules and regulations of the commission.

The term "regularly," as herein used, shall include all employments, whether continuous throughout the year or for only a portion of the year. It means all employments in the usual course of the trade, business, profession or occupation of an employer.

Where any employer procures any work to be done wholly or in part for him by a contractor over whose work he retains supervision or control, and the work so procured to be done is a part or process in the trade or business of said employer, then such contractor and all persons employed by him, and all sub-contractors under him, and all persons employed by any such sub-contractors, shall be deemed, within the meaning of this section, employes of such original employer. Any person, firm or corporation engaged in the performance of work as an independent contractor, shall be deemed an employer within the meaning of this section. The words "inde-

pendent contractor," as herein used, is defined to be any person, association or corporation engaged in the performance of any work for another, and while so engaged, is independent of the employer in all that pertains to the execution of the work is not subject to the rule or control of the employer, is engaged only in the performance of a definite job or piece of work, and is subordinate to the employer only in effecting a result in accordance with the employer's design.

SECTION 3111. (As amended by Ch. 63, Laws of 1919.) The terms "employe," "workmen" and "operative," as used in this title, shall be construed to mean:

(1) Every person in the service of the state, and of every county, city, town or school district, including regular members of lawfully constituted police and fire departments of cities and towns, under any appointment or contract of hire, express or implied, oral or written, except any elective official of the state, or of any county, city, town or school district therein, or other official receiving more than $2,400.00 per year salary.

(2) Every person, except agricultural laborers and domestic servants in the service of any employer, as defined in subdivision 2 of section 3110, who employs three of more workmen or operatives regularly in the same business, or in or about the same establishment, under any contract of hire, express or implied, oral or written, including aliens and also including minors who are legally permitted to work for hire under the laws of the state, but not including any person whose employment is but casual and is not in the usual course of trade, business or occupation of his employer.

All lessees in mines or of mining property, and the employes and contractors of all such lessees who are engaged in the performance of work which is a part or process in the business that is being actually conducted by the lessor, and over whose work the lessor retains supervision, or control, shall be deemed, within the meaning of this section, employes of such lessor drawing such wages as are paid employes for similar work; provided, that the lessor may deduct from the proceeds of ores mined by the lessees the premium required to be paid.

SECTION 3112. (As amended in 1919 and 1921.) The following terms as used in this title shall be construed as follows:

(1) The term "order," shall mean and include any decision, rule, regulation, direction, requirement or standard of the commission, or any other determination arrived at or decision made by such commission.

(2) The term "general order," shall mean and include such order as applied generally throughout the State to all persons, employments or places of employment of a class under the jurisdiction of the commission. All other orders of the commission shall be considered special orders.

(3) The term "welfare," shall mean and include comfort, decency and moral well-being.

(4) The term "safe" and "safety," as applied to any employment or a place of employment, shall mean such freedom from danger to the life, health, safety or welfare of employes as the nature of the employment will reasonably permit.

(5) The words "personal injury by accident arising out of or in the course of employment" shall include an injury caused by the wilful act of a third person directed against an employe because of his employment.

They shall not include a disease except as it shall result from the injury.

(6) The term "compensation" shall mean the compensation and benefits provided for in this title.

(7) The term "award" shall mean the finding or decision of the commission as to the amount of compensation due any injured or the dependents of any deceased employe.

(8) The term "average weekly earnings" shall mean the average weekly earnings arrived at by rule provided in Section 3142.

SECTION 3113. (As amended by Ch. 63, Laws of 1919.) Every employe mentioned in Section 3111, who is injured and the dependents of every such employe who is killed by accident arising out of, or in the course of his employment, wheresoever such injury has occurred, provided the same was not purposely self-inflicted, shall be entitled to receive, and shall be paid such compensation for loss sustained on account of such injury or death,

and such medical, nurse and hospital services and medicines, and such amount of funeral expense, in case of death, as is herein provided.

SECTION 3130. (As amended by Ch. 63, Laws of 1919.) Any employe whose employer has failed to comply with the provisions of Section 3114 hereof, who has been injured by accident arising out of or in the course of his employment, wheresoever such injury has occurred, and which was not purposely self-inflicted, or his dependents in case death has ensued, may, in lieu of proceeding against his employer by civil action in the courts, as provided in the last preceding section, file his application with the commission for compensation in accordance with the terms of this title, and the commission shall hear and determine such application for compensation in like manner as in other claims before the commission; and the amount of compensation which said commission may ascertain and determine to be due to such injured employe, or his dependents in case death has ensued, shall be paid by such employer to the persons entitled thereto within ten days after receiving notice of the amount thereof as fixed and determined by the commission.

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In the Supreme Court
of the United States

October Term, 1923
No. 107

THE CUDAHY PACKING COMPANY OF NEBRASKA,
a corporation,

vs.

MARY ANN PARRAMORE, as Widow and as Guardian of the persons and estates of OWEN PARRAMORE, RUTH PARRAMORE and LUELLA PARRAMORE, minor children of JOSEPH PARRAMORE, deceased, and THE INDUSTRIAL COMMISSION OF UTAH

BRIEF OF DEFENDANTS IN ERROR

BRIEF OF DEFENDANT IN ERROR

FACTS FOUND BY THE INDUSTRIAL COMMISSION:

"That Joseph Parramore, on the 9th day of August, 1921, was fatally injured by accident at or near their plant, located about six miles north of Salt Lake City, Utah, while employed by the Cudahy Packing Company of Nebraska;

"That on said date the Cudahy Packing Company had in their employ in the State of Utah, three or more workmen; that the Cudahy Packing Co. of Nebraska is known and designated as a self-insurer,

paying compensation direct to its injured employes or their dependents;

"That on said date, three workmen, including Mr. Parramore, all of whom lived in Salt Lake City, were traveling in an automobile owned by one of the workmen, approaching the plant where they were employed;

"That while crossing the main line tracks of the Denver & Rio Grande Western Railroad Company, which tracks were alongside the land upon which is located the plant of the Cudahy Packing Company, the automobile in which they were riding was struck by an engine of the railroad company and Joseph Parramore thrown against a post in the right of way fence, which fence also enclosed the property of the Cudahy Packing Company, and was instantly killed;

"That within half a mile of the plant of the Cudahy Packing Company, where Mr. Parramore was employed, it was necessary that Mr. Parramore pass over the main line tracks of the Bamberger Electric Railway Company and the main line tracks of the Oregon Short Line Railroad Company, and the main line tracks of the Denver & Rio Grande Western Railroad Company, and three side tracks and transfer tracks between these various lines of railroad;

"That the Cudahy Packing Company furnished its employees no method of travel or conveyance in coming to or leaving the plant and most of the employees of the company lived in such localities; that it was necessary that they should travel to and from their work, the road which crossed the railroad tracks above mentioned;

"That the plant of the Cudahy Packing Company is dependent upon shipping facilities furnished by the railroads and by necessity the near proximity of the railroads is essential to the successful operation of the plant;

"That the death of Mr. Parramore occurred about seven minutes before the time at which he was to commence work; that the Cudahy Packing Company does not furnish at its plant either board or lodging;

"That there are no public conveyances that could carry employees directly to the plant;

"That employees who went to their work by street cars or by the Bamberger Electric Railway Company must cross the railroad tracks above mentioned, either on foot or by private conveyance;

"That Mr. Parramore, at the time he was killed, was using the most direct and practicable route to the plant of the Cudahy Packing Company and the one ordinarily travelled by the majority of the employees, and by all the employees residing in Salt Lake City."

ARGUMENT UPON THE FACTS

This is not the ordinary case of a workman traveling along a public street on his way to his place of work. In the ordinary case the workman has his choice of roads—he may choose the safer way or he may, for his own convenience, take a more dangerous way and if he is injured before reaching the premises of the employer, the cause of his injury is not at all incidental to the industry in which he is engaged. The case at bar is far removed from that.

The factory of the Cudahy Packing Company is located in immediate proximity to three main line railroad tracks. It is evident, and the Industrial Commission affirmatively so found "That the plant of the Cudahy Packing Company is dependent upon shipping facilities furnished by the railroads and by necessity the near proximity of the railroads is essential to the operation of the plant." All these railroad tracks lie immediately to the east of the plant.

The tracks and the traffic moving upon them, are a constant menace to the company's employees. To say that after the employee has passed the factory gate at night or before he has reached it in the morning he is a part and parcel of the public, and that the menace of those tracks and the moving traffic upon them is not a hazard of occupation in that industry is to grasp at the shadow and ignore the substance, for plainly, if the employee were not engaged in that particular employment, he would not be subjected to that risk.

The tracks in question are not ordinary street car tracks and are not ordinary spurs or side tracks—they are main line tracks of both the O. S. L. and the D. & R. G. W. R. R. and the Bamberger Electric lines.

About one hundred (100) persons are employed at this plant, Some, less than one-half, live in Salt Lake City about six (6) miles distant and many to the north. Employees

living beyond walking distance, whether in Salt Lake City or to the north, can travel to the plant by street car, by Bamberger Electric, or by auto. All who travel by street car, Bamberger Electric or auto from Salt Lake City or the north and those who walk, in the last half mile before reaching the plant, must either walk or drive across main line railroad tracks, upon which trains are constantly passing, and four connecting and side tracks in more or less common use.

It is idle to say that the employee, upon leaving the factory gate, has a choice of routes home and for that reason the employer has no control over him and therefore no responsibility for injuries to him. In this case, the employee has no choice of roads from the plant. He must travel the east and west road across the main line railroad tracks. In fact the contract of employment clearly contemplates that the employee must cross those main line railroad tracks at least two times each day. It is an incident well known and understood by both parties when the contract of employment is made.

No provision is made at the factory to furnish either meals or lodging. Employees must approach the factory at the beginning of each shift and must leave it at the conclusion of the shift, and they must approach and leave across these main line railroad tracks. The road, east and west, from the Salt Lake and Ogden highway to the factory,

is the only practicable route by which the employees can reach and leave the factory. No attempt whatever is made by the factory to protect employees from injury while approaching and leaving and no private way is furnished.

In other words, the immediate proximity of active railroad lines forms a constant menace to the lives of the employees. The only way the employees can avoid the menace is to give up their employment. If they continue to work at this factory, they must be subjected to this menace. Under these circumstances, the risk is peculiar and incidental to the employment, and injury, such as occurred in this case, arises out of the employment.

In this case, Mr. Parramore was killed about seven minutes before his shift started, so close to the premises of the Company that the Superintendent stated that from his observation of the body of the deceased and of the demolished automobile immediately after the accident, it appeared to him that Mr. Parramore had been thrown by the force of the engine against a post in the line fence of the Cudahy Packing Company and bounced back about three feet into the right of way of the railroad. He was "almost within reach" of his actual place of work, and undoubtedly had the fence post not been there, he would have been thrown by the force of the accident upon the premises of the Company.

THE UTAH STATUTE.

In the original Industrial Commission Law of Utah (Section 3113, Compiled Laws of Utah, 1917), provision was made for the payment of compensation as follows:

> "If a workman receives personal injury by accident *arising out of and in the course of his employment* his employer or the insurance carrier shall pay compensation in the amounts and to the persons hereinafter specified."

The words "arising out of and in the course of his employment" were taken from the State and foreign laws then in existence. Practically the same wording was then and still is a part of the English and Canadian compensation statutes and of the very great majority of the compensation statutes in the various States of the Union. These words have been given very specific meaning and are undoubtedly the basis of decision generally where the right to compensation is in issue.

In order to be compensable, the accident must not only have "arisen out of" the employment, but it must also have occurred "in the course of" the employment.

Bradbury's Compensation Law, Vol. 1, page 398.

The words "in the course of" the employment are susceptible to two different constructions. The first is that the injury in question occurred during the working hours, that is, while performing the service contemplated by the

employment during the actual shift. The other and broader construction is, that the relation of master and servant must exist at the time of the accident in order that the injury be compensable. This latter construction is of course, fundamental because, if that relation does not exist, the statute creating the Industrial Commission has no application at all. The second construction is the one generally adopted by the Courts and so the actual period, during which injuries that occur to the servant are compensable, is somewhat extended.

Ordinarily the employment is carried on upon the premises of the employer and the cases generally hold that a compensable injury must not only have "arisen out of" and "in the course of" the employment, but must have occurred *upon the premises* of the employer. Many cases so holding can be marshalled, all based upon the form of statute originally a part of the Utah law.

However, under this form of statute, the injustice of such limitations was manifestly apparent to the various commissions and courts and exceptions to its strict application were made. For this reason, text writers came to be very cautious in stating the rule.

> "The rule under the Common Law Employers Liability Act and Workmen's Compensation Statutes seems to be that, *usually*, an employer is not liable for injuries to an employee before he reaches or after he departs from the employer's premises,

unless the employee is riding upon a conveyance, furnished by the employer and which conveyance is supplied under an agreement, express or implied, by the employer, as a part of the contract of employment."

Bradbury's Workmen's Compensation Law, Vol. 1, p. 404.

The purpose of the compensation law is:

"to eradicate, utterly, the injustice to employers and employees, and the public as well, of the old system, and to substitute in its place an entirely new one based upon the highest conception of man's humanity to man and obligation to industry upon which all depend; recognizing the aggregate of its attending accidents as an element of cost to be liquidated and balanced in money in the course of consumption."

City of Milwaukee vs. Miller, 154 Wis. 652.

The unfairness and injustice of the restrictions upon compensation under the old form of law came to be recognized and so the State of Utah (Session Laws of Utah, 1919, page 158) adopted an entirely different rule; by which compensation shall be granted for an accident to a workman,

"arising out of, *or*, in the course of his employment, wheresoever such injury has occurred."

The wide difference between Utah's present law and the uniform provision theretofore existing is apparent to the careful reader. Now the accident may "arise out of" and not be "in the course of" the employment (clearly and

squarely adopting the broader construction of those words) and is compensable if it "arises out of" *or* is "in the course of" such employment "wheresoever such injury has occurred." In other words, it need not occur strictly during the working hours and it need not occur on the premises of the employer; it is sufficient if the relation of master and servant existed and if the accident logically arose out of the employment. The difference between the old and the new statute is very great. Decisions of commissions and courts generally must be carefully read with the difference in statute provisions in mind.

We do not care to discuss at length the question of whether or not the relation of master and servant existed between Mr. Parramore and the Cudahy Packing Company at the time of the accident. He had been regularly employed by that company for two years, day after day, and week after week—he was paid semi-monthly and had a regular shift. To hold that he was not an employee of the Cudahy Packing Company on that morning until the moment his shift actually started, does violence to a true sense of justice and entirely ignores the spirit and purpose of the Industrial Commission Law.

CITATIONS.

Before such statutes existed—in Common Law Negligence Cases, it was held that the employment continued beyond the working hours as illustrated in the following Illinois case:

The petitioner was employed in defendant's hotel at $14.00 per month and her board and room on the third floor. The elevator was used by both guests and employees. She had finished her work for the day and was off shift until the next morning. About 9 p. m. she went out for a walk, returned to the hotel about 11 p. m. She was injured in the elevator. The question was whether she was a passenger (guest) in the elevator or an employee of the hotel. The Supreme Court of Illinois held she was an employee.

> "The plaintiff had finished her work for the day and went out of the hotel for recreation, and was returning to her room and her duties. Her going out of the hotel for a walk was not inconsistent with the relation of master and servant existing between her and the defendant, and was in accordance with the ordinary and usual custom of house servants when not actually engaged in their duties."

> "The plaintiff was returning to her room for the purpose of resuming her work in the morning, and there was no evidence under which she could be held to be a passenger by being in the elevator."

> Walsh vs. Cullen, L. R. A. (N. S.), Vol. 18, p. 913.

The following cases illustrate the holdings of various courts and commissions upon the subject of injuries arising out of the employment.

A boy 14 years of age was injured on his way to his place of employment at the close of the lunch hour. He was passing along the usual way when he was attracted out of his course to a machine in which he was injured. The only question was whether at the time of his employment he was "performing service growing out of and incidental to his employment." The Commissions awarded compensation.

> "The award of the commission is not only in accord with the spirit and intent of the Workmen's Compensation Act, but is within the rule established by the adjudicated cases. One who is on his way to his place of employment is performing service growing out of and incidental to his employment."
>
> Stoughton v. Mathiason, etc., N. C. C. Cases, Vol. 12, p. 390.

The petitioner was employed on construction work for a contractor alongside of railroad tracks near a station house which was on the side of the tracks with the building. He had occasion to go to a toilet and in going to the station to use the toilet walked so near the tracks that he was injured by a passing engine. He was given compensation.

> "On the question whether the accident arose out of and in the course of the employment, the court reached the conclusion, under the conditions revealed by the evidence that the act of the petitioner in following the course which he took along the railroad track was such an act as could be reasonably expected of one engaged in his work at the

place in question and under the circumstances of his need at the time."

Madden vs. Whitman, N. C. C. Cases, Vol. 12, p. 556. (38 N. J. L. J. 113).

The deceased went ashore from his vessel to procure soap, tobacco and clothes for his personal needs and spent some time in a saloon. On returning, he fell from a ladder which connected the quay and the ship and was drowned.

"In these circumstances, it was not, I think, contested that the accident from which death occurred, arose out of the employment; the danger of falling from a ladder which gave the only access from the quay to the ship being in its nature incidental to the service of a seaman." Compensation granted.

Moore vs. Manchester, etc. Butterworth C. Cases, Vol. 3, p. 527.

"A tailoress was injured by her right hand being caught and crushed in the swinging door of the main entrance to a building, the fourth floor of which was occupied by the business of her employer, while she was leaving the building after the close of her day's work. Compensation was refused by defendants, each claiming that the other and not he was the employer of applicant."

"Another question arose as to whether the injury was sustained at a time when applicant was carrying a risk of the commonalty, or whether the protection of the compensation statute covered her until she had left the building and was on the public thoroughfare. The Industrial Commission held that

the accident was sustained in the course of employment."

Chaboya v. Becker, 7 Cal. Ind. Com. 690 (1915), 12 N. & C. C. C., p. 622.

The petitioner was employed by Olsen, who was an independent contractor for Dunn & Co. The two principals occupied one floor of a building to which access was afforded by a flight of stairs which were open to and used by all the tenants of the building and was not under the control of either Olsen or Dunn & Co. At noon she went out for lunch and was hurt upon these stairs.

"The first contention, that she was not in the employ of Olsen while she was going to lunch, cannot be sustained. Her employment was by the week. It would be too narrow a construction of the contract to say that it was suspended when she went out for this merely temporary purpose and was revived only upon her return to the work room."

"Nor do we regard it as decisive against the petitioner that she was injured while upon stairs of which neither Dunn & Co. nor Olsen had control, though they or their employees had a right to use them. These stairs were the only means available for going to or from the premises, where she was employed, the means which she practically was invited by Olsen and by Dunn & Co. to use.

"It was the necessary incident of the petitioners employment to use these stairs. We are of the opinion that according to the plain and natural meaning of the words, an injury that occurred to her while she was so using them arose 'out of and

in the course of' her employment." Sundine vs. Dunn, et al., (Mass.), 105 North Eastern, 433.

"The defendant's employment of the decedent therefore contemplated that he would approach and leave the plant by passing to and from the highway over private property, including either of the footbridges and the railroad tracks parallel with Main street.

"Under these circumstances, this employee was within the scope of his employment when he was passing to or from his work at the plant over the private property lying between Main street and the plant; in other words, the use of this method of approach to the plant by this employee was an incidental term of his contract of employment annexed to it by the consent of his employers."

Procaccino v. E. Horton & Sons, 111 Atl. Rep. 595.

"The death of an employee of a manufacturing company resulted from an injury arising out of his employment where he was struck and killed by an engine operated by a railroad while he was pursuing his way to work along a path crossing the tracks, where such path, although not a public highway, was not only the sole means of ingress and egress for the employees to their place of work, but was the means of access required and authorized by the manufacturing company, and intimately associated with the company's plant as a part of its necessary establishment."

Judson Mfg. Co. v. Industrial Accident Commission, 181 Cal. 300.

"On June 5, 1919, L. Behnken, the husband and father, respectively, quit his work at noon at the usual hour, went home to get his dinner, had dinner, and started back to his work where he was due at one o'clock. He started back at his usual time, and while crossing was accidentally struck and killed by a railroad train operated over the Kansas City Southern Railway Company's tracks. This train did not stop at Hartburg, and had nothing to do with the Hartburg Lumber Company.

"The very conditions and environments of his employment, calling for his continuous and frequent crossing of the railroad, established and sponsored by his employer, as they in fact had been—created a special hazard to which he was necessarily and constantly exposed in performing the service he was expected to render. The risk and danger—being peculiarly imminent as to employees, in consequence of their having so often each day to cross and recross the track—was therefore not one to which the general public was in like manner and degree subjected, but was in truth an incident of the employment itself; and, if the risk was one inherent in or incidental to the employment, the injury, which matured it naturally and necessarily 'had to do with and originated in' the business."

Lumbermen's Reciprocal Ass'n vs. Behnken etal., 226 S. W. 155, 156.

The following discussion of this question by the Supreme Court of West Virginia in 1914 under a statute reading "arising out of and in the course of the employment" shows plainly what that Court thinks of the limitations imposed by that phrase:

"If it had been shown that the decedent approaching his place of work by the only means of access thereto, was almost within the reach of it at the time of his injury, some of the authorities relied upon might justify the allowance of the claim; for the employment is not limited to the exact moment of arrival at the place of actual work, nor to the moment of retirement therefrom. It includes a reasonable amount of time before and after actual work. A reasonable time after the termination of actual work is allowed. If a workman is injured on the premises of the employer, and while leaving his place of actual work by the usual course of travel, the injury is deemed to have arisen out of the employment. Kinney v. Baltimore & O. Employees' Relief Assn., 35 W. Va. 385, 15 L. R. A. 142, 14 S. E. 8.

Since the injury after termination of actual work, while on the premises of the employer and in pursuit of the usual way of leaving the same, is held to be within the course of employment and to have arisen out of the same, it seems clear that an injury to a workman while coming to his place of work on the premises of the employer, and by the only way of access, or the one contemplated by the contract of employment, must also be regarded as having been incurred in the course of the employment and to have arisen out of the same. If, in such case, injury does not occur on the premises, but in close proximity to the place of work, and on a road or other way intended and contemplated by the contract as being the exclusive means of access to the place of work, the same principle would apply and govern. If the place at which the injury occurred is brought within the contract of employment by the requirement of its use by the employee, so that he has no discretion or choice as to his mode or manner of

coming to work, such place and its use seem logically to become elements or factors in the employment, and the injury thus arises out of the employment and is incurred in the course thereof."

Constantine vs. Commission, L. R. A. 1916, "A" —p. 330.

CONCLUSION.

The risk from which the deceased's injury was received was incident to the employment. It was not in the legal sense independent of the relation of master and servant.

The facts in this case do not bring it within the class of "street accidents" ordinarily designated as such. Although it occurred upon a street, and although the blow was received before the deceased was actually upon the premises of the defendant in error, yet it is plain that the risk was incident to the employment and that it arose out of the employment.

This is the view taken by the Industrial Commission of Utah and the view taken by the Supreme Court of Utah. It is the reasonable construction placed upon a Utah Statute by the Utah Supreme Court. Plaintiff in error cannot complain of that.

In order that this Court may fully understand what was, and what was not, determined by the Supreme Court

of Utah, we print in full the opinion of the Supreme Court of Utah, in the appendix to this Brief.

We respectfully submit that the motion of the defendants in error to dismiss the appeal in the above entitled action for the reasons stated in the motion to dismiss and affirm, should be granted, and that if that motion is not granted, then the decision of the Supreme Court of Utah should be affirmed upon the merits.

Respectfully submitted,

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APPENDIX.

IN THE SUPREME COURT OF THE STATE OF UTAH.

CUDAHY PACKING COMPANY
OF NEBRASKA, a corporation,
Plaintiff,

v.

INDUSTRIAL COMMISSION
OF UTAH, et al.,
Defendants.

GIDEON, J.

The plaintiff, Cudahy Packing Company, by writ of review seeks the annulment of an award made by the Industrial Commission in favor of the dependents of Joseph Parramore, deceased. The dependents and the Industrial Commission are made defendants.

There is no dispute about the dependency of the claimants, nor of the fact of employment or wages deceased received.

The plaintiff owns and operates a packing plant in what is known as North Salt Lake, in Davis county, about six miles north from Salt Lake City. More than forty per cent of its employees reside in Salt Lake City. Other employees reside in Bountiful, Centerville, and other villages located further north. Few, if any, of the employees have homes in the immediate vicinity of the packing plant. The plant is approximately one-half mile west of the Salt Lake-Ogden highway. This highway runs north and south. A county road runs west from and at right angles to the Salt Lake-Ogden highway and extends to and beyond the packing plant. A short distance from the highway the county road crosses at right angles the tracks of the Bamberger Electric Railroad. From that point west the county road is the only roadway leading to the packing plant.

The deceased was employed by the plaintiff as an engineer. His hours of work were from 7 a. m. to 4 p. m. On the morning of the accident, August 9, 1921, while riding to work with a fellow employee, he was struck by an engine on the Denver & Rio Grande Western Railroad track and instantly killed. The distance from the place of the accident to the entry to plaintiff's plant was about 100 feet. The Commission, among other things, found:

> "* * * that on said date three workmen, including Mr. Parramore, all of whom lived in Salt Lake City, were traveling in an automobile owned by one of the workmen, approaching the plant where they were employed; that while crossing the main line tracks of the Denver & Rio Grande Western Railroad Company, which tracks were along side the land upon which is located the plant of the Cudahy Packing Company, the automobile in which they were riding was struck by an engine of the railroad company and Joseph Parramore thrown against a post in the right of way fence, which fence also enclosed the property of the Cudahy Packing Company, and was instantly killed; that within half a mile of the plant of the Cudahy Packing Company, where Mr. Parramore was employed, it was necessary that Mr. Parramore pass over the main line tracks of the Bamberger Electric Railway Company and the main line tracks of the Oregon Short Line Railroad Company, and the main line tracks of the Denver & Rio Grande Western Railroad Company, and three side tracks and transfer tracks between these various lines of railroad; that the Cudahy Packing Company furnished its employees no method of travel or conveyance in coming to or leaving the plant and most of the employees of the com-

pany lived in such localities that it was necessary that they should travel, to and from their work, the road which crossed the railroad tracks above mentioned; that the plant of the Cudahy Packing Company is dependent upon shipping facilities furnished by the railroads, and by necessity the near proximity of the railroads is essential to the successful operation of the plant; that the death of Mr. Parramore occurred about seven minutes before the time at which he was to commence work; that the Cudahy Packing Company does not furnish at its plant either board or lodging; that there are no public conveyances that could carry employees directly to the plant; that employees who went to their work by street cars or by the Bamberger Electric Railway must cross the railroad tracks above mentioned, either on foot or by private conveyance; that Mr. Parramore at the time he was killed was using the most direct and practicable route to the plant of the Cudahy Packing Company and the one ordinarily traveled by a majority of the employees, and by all the employees residing in Salt Lake City."

The findings are supported by competent evidence found in the record. It likewise appears that practically all travel over this road is that of the employees and others going to the packing plant, or persons having business with the stockyards located just north of that plant. In certain seasons of the year sheep are herded in the western part of the county and are driven over this county road, but it is quite apparent, that the way is maintained and kept in repair for the benefit of persons traveling to and from the plaintiff's plant.

Upon substantially the foregoing facts an award was made. Plaintiff assails that award. The controlling question before the Commission, and the one before this court, is, did the accident which caused the death of Parramore arise out of or in the course of the employment? It is insisted by plaintiff that the findings are not supported by the testimony; that under the admitted facts the injury is not compensable under the Workmen's Compensation Act of this state; that the relation of employer and employee did not exist at the time of the accident. The Act provides for compensation to every employee whose employment is subject to the Act, if injured "by accident arising out of, or in the course of his employment, wheresoever such injury has occurred." Sec. 3113, Comp. Laws Utah, 1917, as amended by Ch. 63, Laws Utah, 1919.

Our Workmen's Compensation Act differs from a majority of the states in that our statute uses the disjunctive "or" while in most of the compensation laws the conjunctive "and" is found. The compensation law as originally enacted in 1917 provided compensation for injuries arising out of and in the course of the employment. The Act was amended in 1919 to read as above quoted. It is apparent, therefore, that the legislature by the amendment intended to include within the statute accidents not covered by the original act.

The courts generally agree in principle respecting the elements to be considered in determining what accidents

are included in the words "arising out of and in the course of the employment." The Supreme Judicial Court of Massachusetts, In re Employers Liability Assurance Corporation, Ltd., 102 N. E. 697, has given probably as satisfactory and comprehensive a definition of these terms as can be found in any of the cases. It is not, however, necessary or desirable in the determination of this case to attempt a definition of these terms or to differentiate between accidents arising out of or in the course of the employment. If there is liability for the injury under consideration it must be founded upon the inferrable fact that the danger incident to crossing this railroad track, by reason of its location and proximity to the packing plant, must be held to have been within the contemplation of the parties at the date of the employment. The accident would therefore both arise out of and occur in the course of employment. No other theory finds support in the decisions of the reported cases. It is admited that deceased was not on the premises of the plaintiff at the time of the accident. He was not at that time engaged in any actual work connected with his employment. The engine that ran down the automobile was in no way under the control of the plaintiff, nor was it engaged in any work for or in plaintiff's behalf. The engine was under the control of the railroad company and was running south on the main line of that road.

The Commission also found, and it is undisputed, that the plaintiff did not control nor in any way attempt to control the method or manner of travel to or from work by

any of its employees. Neither did the plaintiff furnish any means of conveyance. That was left entirely with the individual employee.

It is argued by counsel for plaintiff that the Commission's finding "that the plant of the Cudahy Packing Company is dependent upon shipping facilities furnished by the railroads and by necessity the near proximity of the railroads is essential to the successful operation of the plant," is erroneous and is not supported by the evidence. In our judgment that finding is not controlling or of much significance. It is undoubtedly true that the successful operation of a packing plant is dependent upon railroad facilities, but that dependence is common to a large percentage of all manufacturing institutions. The proximity of a railroad is a matter of convenience to industries dependent upon shipping facilities. Such facts alone cannot determine the right of claimants to compensation. As above indicated, if plaintiff is liable for the accident it must be upon some other ground than the mere fact of the convenience of having a railroad near its plant, or of its dependence upon shipping facilities.

It was customary, in fact absolutely necessary, for employees going to the plant to work to pass over and across these railroad tracks on the public road where the accident happened. No other means or way existed by which employees could get to the plant. Employees in Salt Lake City had three ways of going to their work—either by

street railway, along the highway, or over the Bamberger Electric Railroad. That election of the way of travel existed until the employees reached the county road running west from the station of the Bamberger Electric line. That point is approximately one-third mile from the packing plant. In going west from that point over the county road the employees necessarily cross the main line tracks of the Oregon Short Line, the main line track of the Denver & Rio Grande Western, and three side tracks and transfer tracks. That condition existed at the time of the employment of deceased and at the time of the accident.

Some stress is laid in the argument on the fact that the roadway over which deceased was traveling was a public highway. No reason or principle is suggested why that fact should be controlling in determining the liability for this accident. It conclusively appears, however, from the testimony that the road, while known as a county road and presumably kept in repair by the county, is there for the accommodation of the plaintiff and its employees, and it is reasonably inferrable that if the packing plant was not located there the county highway would be abandoned as such. If the Workmen's Compensation Law authorizes or permits a recovery for an injury to an employee going to or returning from work over private property under particular circumstances or surroundings, there does not seem to be any logical reason why such liability should not exist in favor of a workman going to or returning from work over a public road under like circumstances or surroundings. If the

liability exists, it is by reason of the fact that the plant or manufacturing establishment is so located that there is no other method or means of approach except over railroad tracks or other dangerous places, and that the same are in such close proximity to the plant that the employee has no election or option in determining or selecting his way of approach.

In Procaccino v. E. Horton & Sons, et al., 111 Atl. 594, the facts were similar to the facts here. In that case the deceased was employed in a manufacturing plant located immediately east of a canal. West of the canal were several railroad tracks and still farther west was a highway. The deceased had his home west of the highway. Two foot bridges were constructed over the canal from the plant to the railroad tracks. It was the custom of the deceased and other employees of the defendant manufacturing company in that case and other companies to indiscriminately use these bridges. The deceased was in the habit of going to and from his home over one of the bridges and passing over a pathway across the railroad tracks. On returning to work at the noon hour he was injured by an engine passing along one of these tracks. In discussing the right of the dependents of the deceased, the court says:

> "The defendants' employment of the decedent therefore contemplated that he would approach and leave the plant by passing to and from the highway over private property, including either of the foot-bridges and the railroad tracks parallel with Main street.

"Under these circumstances this employee was within the scope of his employment when he was passing to or from his work at the plant over the private property lying between Main street and the plant; in other words, the use of this method of approach to the plant by this employee was an incidental term of his contract of employment annexed to it by the consent of his employers. Merlino v. Connecticut Quarries Co., 93 Conn. 57, 104 Atl. 396.

"When this employee, under the facts found, entered upon the private property lying between Main street and the defendants' plant, he came within the zone of his employment, and all dangers and perils incident to the use of this method of approach were perils incident to and arising out of his employment."

In re Sundine, 105 N. E. 433, the court, in considering the right of the claimant for compensation, said:

"Nor do we regard it as decisive against the petitioner that she was injured while upon stairs of which neither Olsen nor Dunne & Co. had control, though they and their employees had the right to use them. These stairs were the only means available for going to and from the premises, where she was employed, the means which she practically was invited by Olsen and by Dunn & Co. to use. In this respect, the case resembles Moore v. Manchester Liners, supra; and that case, decided under the English act before the passage of our statute, must be regarded as of great weight. (Citing cases.)

"It was a necessary incident of the petitioner's employment to use these stairs. We are of opinion that according to the plain and natural meaning of

> the words an injury that occurred to her while she was so using them arose 'out of and in the course of' her employment."

In the second headnote in Judson Mfg. Co. et al v. Ind. Acc. Com. 181 Cal. at p. 300, which reflects the opinion of the court, it is said:

> "The death of an employee of a manufacturing company resulted from an injury arising out of his employment when he was struck and killed by an engine operated by a railroad company while he was pursuing his way to work along a path crossing the tracks, where such path, although not a public highway, was not only the sole means of ingress and egress for the employees to their place of work, but was the means of access required and authorized by the manufacturing company, and intimately associated with the company's plant as a part of its necessary establishment."

The Supreme Court of West Virginia, in De Constantin v. Pub. Service Com., 83 S. E., at p. 89, in considering a question similar to the one presented by this record, says:

> "Since injury after termination of actual work, while on the premises of the employer and in pursuit of the usual way of leaving the same, is held to be within the course of employment and to have arisen out of the same, it seems clear that an injury to a workman while coming to his place of work on the premises of the employer and by the only way of access, or the one contemplated by the contract of employment, must also be regarded as having been incurred in the course of the employment and

to have arisen out of the same. If, in such case, injury does not occur on the premises, but in close proximity to the place of work and on a road or other way intended and contemplated by the contract as being the exclusive means of access to the place of work, the same principle would apply and govern. If the place at which the injury occurred is brought within the contract of employment, by the requirement of its use by the employee, so that he has no discretion or choice as to his mode or manner of coming to work, such place and its use seem logically to become elements or factors in the employment, and the injury thus arises out of the employment and is incurred in the course thereof. But, on the contrary, if the employee, at the time of the injury, has gone beyond the premises of the employer, or has not reached them, and has chosen his own place or mode of travel, the injury does not arise out of his employment, nor is it within the scope thereof."

See also 1 Honnold on Workmen's Comp., 1368, and Lumbermen's Reciprocal Assn. v. Behnken et al., 226 S. W. 154.

Plaintiff's contention is that the deceased received the injury while on his way to work at a place not under its control, and at a time when the relation of employer and employee did not exist. It is therefore argued that the deceased was exposed to no other or greater dangers than any member of the public traveling over this road; that any accident resulting from such exposure does not entitle the injured person to compensation under the Workmen's Compensation Act, regardless of the fact of employment.

Numerous cases are cited in support of that contention, among others the following: In re Employers Liability Assurance Corp., 102 N. E. 697; Honnold, Work. Comp. 1917, Sec. 359; Nowalek et al. v. N. Y. Con. R. Co. (N. Y.) 128 N. E. 888; United D. & R. Co. v. Ind. Com., 126 N. E. 184; In re Brown, 169 N. Y. S. 1047, 15 N. C. C. A. 290; Leveroni v. Travelers Ins. Co., 107 N. E. 349; City of Milwaukee v. Althoff, 156 Wis. 68, 145 N. W. 238; Wilson v. H. C. Frick Coke Co., 110 Atl. 723.

Conceding that the weight of authority denies to an employee the right to compensation for an injury received while on his way to or from his employment, the question here, in its final analysis, is, Did the particular facts surrounding this accident make this case an exception to the holdings of the courts? The Commission was of the opinion that the facts in this case warranted the conclusion that the general rule invoked by plaintiff did not apply. It is not easy, and probably not possible or desirable, to state any general rule applicable to every condition or state of facts by or under which compensation can be allowed or denied to an employee. Courts are usually controlled in allowing or denying compensation by the peculiar facts of each case. In In re Bollman, 126 N. E. 639, the Supreme Court of Indiana says: "The question in each case must be determined from a consideration of its own facts and circumstances." That statement is approved by the same court in a later case—Empire H. & A. Ins. Co. v. Purcell, 132 N. E. 664.

Considering the findings of the Commission and the undisputed facts which appear in this record, and weighing the effect of those facts in the light of the authorities, we are of the opinion that there is sufficient competent testimony to support the Commission's findings and that the findings applied to the particular facts in this case support the award.

Since the oral argument and the submission of this case plaintiff has asked and received permission to file an amendment to its petition for writ of review. The burden of that amendment is that the compensation law contravenes both the State and Federal Constitutions—that it in effect deprives the individual of property without due process of law. It is insisted that

> "To hold that Section 3113, which provides: 'Every such employee who is killed by accident arising out of, or in the course of his employment, wheresoever such injury has occurred,' etc., means that said provision of the Statute extends so as to obligate the employer to indemnify its employees for accidents not a part of the hazard of the industry, and not occurring while actually engaged in the work of the employer, renders the Act contrary to the provisions of the Constitution of the State of Utah, to-wit:
>
> "Sec. 7 of Article I of the Constitution of the State of Utah which reads as follows:
>
> " 'No person shall be deprived of life, liberty or property without due process of law'

and contrary to the provisions of Sec. 1 of Article XIV of the Constitution of the United States providing that:

> " 'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law'

for the reason that to so hold, makes said Statute come under the constitution's condemnation of all arbitrary power so prohibited both by the Constitution of the State of Utah and the Constitution of the United States as above set forth."

That the general and underlying principles of the Workmen's Compensation Law do not conflict with any constitutional right of employer or employee is not an open question in this state. (Ind. Com. v. Daly Min. Co., 172 Pac. 301; Garfield Smelting Co. v. Ind. Com., 178 Pac. 57; Ind. Com. v. Evans, 174 Pac. 825; Reteuna v. Ind. Com., 185 Pac. 535; Utah Copper Co. v. Ind. Com., 193 Pac. 24; Salt Lake City v. Ind. Com., 199 Pac. 152.) The contention here, however, seems to be that that part of Sec. 3113, supra, which authorizes compensation for an injury "wheresoever such injury has occurred" is an attempt to charge an industry for something not a part of the hazard of such industry. Of necessity, that phrase should be construed in connection with and as a part of the entire section. When so construed it follows that the accident, wheresoever it has occurred, must also arise out of or be in the course of the employment. So interpreted we fail to see any in-

fringement of plaintiff's constitutional rights.

We are referred to the opinion of the Supreme Court in Interstate Commerce Commission v. Louisville & Nashville R. R. Co., 227 U. S. 88, as supporting plaintiff's contention. It does not appear in the record before this court that the Commission or any member of it visited the place of the accident. On the contrary it is affirmatively stated in plaintiff's brief that the Commission did not visit the place of the accident. Presumably therefore nothing was considered by the Commission except testimony taken at a regular hearing. We are, however, of the opinion and so hold that it affirmatively appears from the testimony found in this record that the Commission's findings are supported by such testimony. The opinion of the Supreme Court in the above case is therefore not applicable or controlling in this case.

The award is affirmed with costs.